United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

76-1267

To be argued by
JOHN A. LOWE

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P/S

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 76-1267

UNITED STATES OF AMERICA,
Appellee,

—v.—

WILLIAM RODMAN and
WILLIAM ROSENBERG,
Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF AND APPENDIX FOR THE UNITED STATES OF AMERICA

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BRIEF FOR THE UNITED STATES OF AMERICA

Preliminary Statement

William Rodman and William Rosenberg appeal from judgments of conviction entered on May 28, 1796 in the United States District Court for the Southern District of New York, after a one week trial before the Honorable Lee P. Gagliardi, United States District Judge, and a jury.

Indictment 76 Cr. 43, filed January 15, 1976, charged the defendants Rodman and Rosenberg with one count of conspiracy to violate the federal securities laws (Title 15, United States Code, Sections 77q, 77x, 78j(b) and 78ff) and the mail fraud statute (Title 18, United States Code, Section 1341), all in violation of Title 18, United States Code, Section 371.

Trial commenced on March 24, 1976, and ended on March 30, 1976, when the jury found both defendants guilty.

On May 28, 1976, Judge Gagliardi sentenced each defendant to fifteen months' imprisonment, execution of all but four months of which was suspended, and a forty-seven month term of probation to follow service of the prison sentence.

The defendants are at liberty pending this appeal.

Statement of Facts

The Government's Case

During 1975, the defendant Rosenberg was employed as a trader at John R. Maher Associates, Inc. (Maher), a registered broker-dealer owned by Rosenberg's wife, where he acted as a principal market-maker for the common stock of Franklin Properties, Inc. (Franklin), which was publicly traded on the over-the-counter market. (Tr. 34, 281-86, 387-88, 394).* While acting as a market maker for Franklin stock, Rosenberg also acquired, secretly through various nominees, approximately 150,000 shares of Franklin stock which he had available for sale to the public. (Tr. 203-19, 307-16, 324-25, 460-74; GX 5B, 7, 7A, 7B, 7C, 7D, 7F, 7G, 8, 8A, 8B, 9, 9A, 9B, 11, 12, 13B, 13C, 13D, 14).

In late 1975, Leon Nash, a merger and acquisition consultant, introduced Rosenberg to the defendant Rod-

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* References to the trial transcript are in the form "Tr. —"; to Government Exhibits in the form "GX —"; to defense exhibits in the form "DX —"; to Appellant's Appendix in the form "App. —"; to Appellant's Brief in the form "Br. —".

man, allegedly for the purpose of arranging a merger between Franklin and an unnamed Florida real estate company. (Tr. 270-74). Nash had a longstanding business relationship with both Rosenberg and Rodman who had, at various times, acted as Nash's securities broker. Rodman had previously been actively employed as a broker and trader in the securities business, but was not so employed in late 1975. (Tr. 48, 271, 277-78).

During November, 1975, Rodman had a series of conversations with J. Kenneth Noonan, a registered representative at the broker-dealer firm of Leyner, Dreskin & Co., during which Rodman told Noonan he was putting together a securities deal in which Leon Nash might be involved and solicited Noonan's interest without giving him any specific details. (Tr. 47-49). On December 3, 1975, Rodman called Noonan on the phone and told him to go to a "safe telephone" and call him back at the Holiday Inn in Binghamton, New York where Rodman was staying. (Tr. 50-51). When Noonan returned the call, Rodman told Noonan that the deal he was working on involved Franklin stock and that for every share Noonan sold to his customers at one dollar, Noonan would be paid a bribe of fifty cents in cash. When Noonan inquired about how he would be paid, Rodman told him he would put him in touch with the other party involved and not to worry about it. (Tr. 52).

On the morning of December 4, 1975, Noonan reported all of Rodman's solicitations to the United States Attorney's Office. Later that morning, Rodman called Noonan and gave him the defendant Rosenberg's first name and phone number at Maher, telling Noonan that Rosenberg would explain anything else Noonan wanted to know. (Tr. 54-55).

After again reporting to the United States Attorney's Office and being requested to follow through on Rodman's

instructions, Noonan telephoned Rosenberg at Maher. Rosenberg told Noonan he would pay him a bribe of fifty cents in cash for every share of Franklin stock that Noonan sold at one dollar, less five percent for "laundering" the payoff money. (Tr. 55). Rosenberg also instructed Noonan to "direct" all his purchases to Maher so that Rosenberg could control the price. (Tr. 56).*

On the night of December 4, Noonan telephoned Rodman from the United States Attorney's Office in the presence of Thomas Doonan, an employee of the United States Attorney, who, with Noonan's consent, tape recorded the conversation. (Tr. 57-58, 355-56; GX 4). During the conversation, Noonan told Rodman of his discussions with Rosenberg and expressed concern about actually receiving the promised bribe. Rodman told Noonan not to wory about it, because he, Rodman, had "spelled it out to" Rosenberg, and Rosenberg understood his obligations. (GX 4).

On December 5, Noonan telephoned Rosenberg from the United States Attorney's Office in the presence of Mr. Doonan who, with Noonan's consent, again tape recorded the conversation. (Tr. 63-64, 355-56; GX 5B). In this conversation Rosenberg reiterated all the details of his earlier illegal offer to Noonan, the fifty cents per share bribe with five percent off for "laundering", and then discussed the need for secrecy, the necessity for Noonan to direct all his purchase orders to Maher, the manner in which Noonan would be paid and the mechanics of completing the proposed transactions. In addition, Rosenberg assured Noonan he would be paid, saying "you can trust me implicitly . . . if Bill [Rodman] OK's me, trust me." (GX 5B).

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* This is a violation of the National Association of Securities Dealers rules which require that brokers shop around to obtain the lowest price available for their customers. (Tr. 56).

On December 8, Rosenberg was arrested pursuant to an arrest warrant, and the Securities and Exchange Commission suspended trading in Franklin stock.

The Defense Case

Rodman called Elaine Winter, secretary to Morton Berger, counsel for Rodman, who testified that, on November 20, 1975, Ken Noonan telephoned several times trying to get in touch with Rodman, saying it was urgent. Mrs. Winter testified that she told Mr. Berger about the calls and that Mr. Berger told her he had gixen Rodman's phone number to Noonan. (Tr. 549-51).

Rodman also called his wife, Rosemary, as a witness. She testified that during November, 1975 she overheard Rodman speaking on the phone to someone he called "Ken" and that she heard Rodman say that he had not been involved in stocks for years, did not want to be involved, and "didn't want any part of it". She testified that he seemed very concerned or upset. (Tr. 556-58). (Any testimony about what Rodman said to her after this phone conversation was excluded.)

Mrs. Rodman also testified that a person who identified himself as Ken Noonan telephoned her on December 1, 1975 and, thereafter, she called her husband and told him she had given his phone number in Binghamton to Ken Noonan. (Her testimony about what Rodman said to her upon receiving this information was also excluded.) (Tr. 559-60).

Rodman also produced the records of toll calls from his home for the period November 22 to December 18, 1975 and the Kings County, New York, Supreme Court records of Noonan's felony indictment for gun possession which had ultimately been dismissed. (DX C, D).

The defendant Rosenberg called no witnesses and offered no evidence.

ARGUMENT

POINT I

The evidence was sufficient to sustain the convictions.

Defendants argue that the evidence was insufficient to sustain a conviction for conspiracy to violate the anti-fraud provisions of the securities laws and the mail fraud statute in two respects: (1) that there was insufficient proof of a specific intent to use the mails; and (2) that there was insufficient proof of the defendant Rodman's participation in the alleged conspiracy. Both arguments are without merit.

A. Intent to use the mails.

Relying on cases which antedate *United States* v. *Peola*, 420 U.S. 671 (1975), the defendants contend that the Government was required to prove beyond a reasonable doubt that they intended and agreed to use the mails or that use of the mails would have been "essential" to a successful completion of the scheme. More specifically, they claim that the Government's proof on that issue was insufficient because it failed to eliminate the implausible possibility that the stock sale confirmation slips, required by law in all securities transactions, see 17 C.F.R. § 240.15c1-4 (1973); *United States* v. *Marando*, 504 F.2d 126, 128 n.4 (2d Cir.), *cert. denied sub nom. Berardelli* v. *United States*, 419 U.S. 1000 (1974), might have been hand delivered. Even assuming that the standard of proof defendants seek to impose upon the Government were accurate—and we submit it is unnecessarily burdensome—the evidence in this case

was sufficient for the jury to conclude beyond a reasonable doubt that the defendants intended to use the mail.*

The cashier of Maher, the man in charge of all record keeping and related paperwork including the sending of confirmations, testified that, when Maher sold stock to another broker, the regular practice was to mail a confirmation of the sale to the other broker. (Tr. 41-43). The scheme in this case contemplated sales of Franklin stock by Maher to Leyner, Dreskin & Co. for resale by Leyner, Dreskin to Noonan's customers. Accordingly, had the agreed upon scheme been completed, confirmations inevitably would have been mailed from Maher to

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* The court instructed the jury as follows on the issue of the use of the mails:

> "Now there is no proof in this case that the mails were actually used. If you should find that the nature of the planned criminal activity, that is, the sale of Franklin Properties stock to Noonan's customers under false pretenses, *required the use of the mails*—if you should find that the nature of the activity,that is, the sale of fraudulent Franklin Properties stock to Noonan's customers under false pretenses *required the use of the mails* and that the defendants, by reason of their experience, knew this because if sales had been made to Noonan's customrs, confirmations of those sales would have been mailed to the customers according to the regular practice of the industry and the sales to Noonan's firm by John R. Maher Associates, Inc. would have been confirmed by mail to Noonan's firm by John R. Maher Associates, according to the regular practice in the industry.
>
> If you find beyond a reasonable doubt that the nature of the alleged criminal plan agreed to by the defendants, and that there was such a plan—and I am not saying that there is, but if you should find that there was, would cause the mails to be used in the ordinary course of business, and that the defendants knew this, this would be sufficient under the mail fraud provisions." (Tr. 731) (emphasis supplied).

It is significant that the court's charge required the jury to find that the unlawful scheme "required the use of the mails." This is precisely the standard of proof which the appellants argue the Government was required to satisfy on this element.

Leyner, Dreskin in the ordinary course of business to bring the scheme to fruition. *United States* v. *Marando, supra;* see also *United States* v. *Cohen,* 518 F.2d 727, 737 (2d Cir. 1975), (where this Court recognized that the mailing of confirmations is part of the "generally accepted procedures in the handling of over the counter stock sales" and was a "necessary step" in the execution of the fraudulent scheme).

Furthermore, Noonan, a registered representative at Leyner, Dreskin and thus familiar with its procedures, *United States* v. *Kaufman,* 429 F.2d 240, 244 (2d Cir.), *cert. denied,* 400 U.S. 925 (1970), testified that when Leyner, Dreskin sold stock to its customers, confirmations of the sale were mailed to its customers. (Tr. 66-67). The jury could in light of this testimony have reasonably concluded that, if the scheme had been successful, Leyner, Dreskin would quite clearly have mailed confirmations to Noonan's customers who purchased Franklin stock.

Defendants reply to all of this is that, since there exists a hypothetical possibility that the confirmation slips could have been picked up or delivered by hand, use of the mails was not "'essential" to the scheme. The adoption by defendants of a definition of "essential" which requires the exclusion of even the most remote, implausible hypothetical possibilities finds no support in the very cases upon which they rely.

In *Mansfield* v. *United States,* 155 F.2d 952 (5th Cir. 1946), the fraudulent scheme required the delivery of deeds to texas land to California purchasers. The court held that the use of the mails to accomplish this was "essential", even though, as in this case, there was no proof to exclude the hypothetical possibility of delivery of the deeds by some medium other than the mails. Similarly, in *Banister* v. *United States,* 379 F.2d 750 (5th

Cir. 1967), the scheme required delivery of fraudulent insurance claim forms by the local agent in Florida to the company's home office in New York. The court held that the use of the mail was "required" despite the hypothetical possibility, similar to that urged by appellants in this case, that the local agent could have personally delivered the forms to New York.

The scheme in this case contemplated, after all, the sale of as much as 150,000 shares of Franklin stock to Noonan's various customers. Although the hypothetical possibility of hand delivering the required confirmations to *each* of Noonan's customers who purchased Franklin stock existed, it is even less plausible than the possibility in *Banister* of the Florida agent hand delivering the claim to New York. This is especially so in light of the fact that the defendants discussed absolutely nothing which would have prevented the "ordinary course of business" from being followed in this case. On the contrary, Rosenberg told Noonan it would be sufficient if he simply called his orders in to whoever answered the phone at Maher. (GX 5B). The jury's conclusion that the ordinary course of business would have been followed was certainly warranted.*

But while we submit that the onerous legal standard suggested by appellants was clearly met in this conspiracy case that standard is no longer the law.

Specific intent to use the mail is not a required element to establish a *substantive violation* of the mail fraud

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* Because both Rodman and Rosenberg were men of extensive experience in the securities industry, it was also proper for the ujry to infer that they "must have known that the mailing of confirmations was routine in the sale of securities on the over the counter market." *United States* v. *Kaufman, supra.*

statute. "Where one does an act with knowledge that the use of the mails will follow in the ordinary course of business, or *where such use can reasonably be foreseen*, even though not actually intended . . ." that is sufficient. *Pereira* v. *United States*, 347 U.S. 1, 8-9 (1954) (emphasis supplied); see also *United States* v. *Finkelstein*, 526 F.2d 517, 526-27 (2d Cir. 1975), *cert. denied*, 99 Sup. Ct. 1742 (1976).

Prior to the Supreme Court's recent decision in *United States* v. *Feola*, *supra*, however, this Circuit, specifically relying on the doctrine of *United States* v. *Crimmins*, 123 F.2d 271 (2d Cir. 1941), ruled that proof of specific intent to use the mails was required when a defendant was charged with conspiring to violate the mail fraud statute. *United States* v. *Cohen*, 145 F.2d 82, 91 (2d Cir. 1944).

In *Feola*, the Supreme Court, characterizing *Crimmins* as "bad law," 420 U.S. at 690, held that "where knowledge of the facts giving rise to federal jurisdiction is not necessary for conviction of a substantive offense embodying a *mens rea* requirement, such knowledge is equally irrelevant to questions of responsibility for conspiracy to commit that offense." *Id.* at 696. Accordingly, after *Feola*, it should only be necessary for the Government to prove in a conspiracy case that use of the mails could reasonably have been foreseen by the defendants—the same standard applicable to a substantive offense. Of course, the evidence introduced by the Government satisfied this standard, as it did the more onerous standard proposed by the defense.

Defendants' attempt to distinguish *Feola* by limiting it to its specific facts must be unavailing. The rationale of *Feola* has been applied by this Court to cases involving conspiracy to violate the theft from interstate commerce statute, *United States* v. *Viruet*, Dkt. No. 76-1059, slip

op. 5149, 5152 (2d Cir., Aug. 5, 1976), conspiracy to violate the conflict of interest statute, *United States* v. *Podell*, 519 F.2d 144, 150 n.7 (2d Cir. 1975), and conspiracy to possess property stolen from a bank, *United States* v. *Tavoularis*, 515 F.2d 1070, 1074 n.9 (2d Cir. 1975). More significantly, the Third Circuit has expressly applied the holding in *Feola* to cases charging conspiracy to commit mail fraud. *United States* v. *Klein*, 515 F.2d 751, 753 n.3a (3rd Cir. 1975).

B. Participation in the conspiracy.

Defendants argue that the evidence failed to establish "that any agreement existed between Rodman and Rosenberg to advance a joint interest or common goal." (Br. 34). To the contrary, the proof was overwhelming that Rodman and Rosenberg agreed to advance the common goal charged in the indictment, *i.e.*, "fraudulently to inflate the market price of Franklin . . . stock through . . . bribes to brokers . . . , and fraudulently to unload approximately 150,000 shares . . . on the unsuspecting public."

The evidence of Rodman's own acts and statements demonstrated that in November, 1975, Rodman was putting together a securities deal in which he wanted Ken Noonan to participate. (Tr. 47-48). From this the jury properly concluded that Rodman was by his own admission not only a participant in but the architect of the overall scheme which he finally presented in detail to Noonan on December 3. On December 3, Rodman presented Noonan with a complete offer and only in response to Noonan's inquiries about how he could be sure of being paid the promised bribe did Rodman offer to put Noonan in touch with the other party to the deal, his co-defendant and co-conspirator, Rosenberg,

whom Noonan did not even know. (Tr. 52). Thereafter, Rodman repeatedly assured Noonan that if he performed, he could rely on being paid. (GX 4).

Defendants seem to argue (1) that because there was no direct proof that Rodman would receive any financial reward, he did not have any "stake in the venture" and (2) that because Rodman made certain highly equivocal remarks to the effect that he did not want to be concerned about the payments, he had no intent to participate in the conspiracy.

The first argument is based on a misunderstanding of *United States* v. *DiRe*, 159 F.2d 813 (2d Cir. 1947). In that case, the court held that a party's mere presence at the scene of negotiations to sell counterfeit gas ration stamps was insufficient to establish probable cause to arrest him as a conspirator. In *DiRe* there was a complete absence of proof that the defendant had any interest whatever, financial or otherwise, in the transaction and a complete absence of proof that he had done anything whatsoever to assist in promoting the venture. *DiRe* is thus totally inapplicable to this case in which Rodman participated directly in the venture by trying to bring Noonan, an essential third party, into the scheme.

Whether Rodman anticipated receiving a financial benefit was, of course, not critical to the Government's case. Having a stake in the venture is not limited to a financial interest. It is sufficient that the defendant participate in the venture as something he wishes to bring about or seeks by his action to make it succeed. *United States* v. *DeJesus*, 289 F.2d 37, 40 (2d Cir.), *cert. denied*, 366 U.S. 963 (1961); *United States* v. *Peoni*, 100 F.2d 401, 402 (2d Cir. 1938). Clearly Rodman's actions in this case make it clear that he and

Rosenberg were working toward the common goal of fraudulently unloading Franklin stock on Noonan's customers. Rodman could not have made the offer to Noonan unless he already had an agreement with Rosenberg to offer Noonan a bribe, and Rosenberg's immediate response to Noonan when Noonan told him that Rodman had told him to call demonstrates that there was such an agreement.

In any event, Noonan testified that Rodman "implied" that he expected something from Noonan in the way of a financial reward (Tr. 90), and the jury could certainly have concluded from the extent of his efforts that Rodman must have anticipated some profit.

Defendants' second argument is based on a strained interpretation of the recorded conversation between Rodman and Noonan on the evening of December 4. (GX 4). By quoting selected portions out of context, they argue that Rodman evidence a desire not to participate in the scheme. The entire conversation, a transcript of which is set forth in the Government's Appendix, however, demonstrates that Rodman was actively participating in the scheme at least to the extent of recruiting Noonan, assuring Noonan that he would be paid, and making sure, for Noonan's benefit, that Rosenberg understood that Noonan was to be paid in full for all of the stock he was able to sell—"I spelled it out to him." (GX 4).

The argument advanced here was made to the jury who had heard the tape of the entire conversation, including the tone of voice and inflections, and the jury quite clearly concluded that Rodman's protestations of "I don't wanna know" and "I don't even want to be concerned" were disingenuous at best and likely intended as an attempt to avoid disclosing the full extent of his involvement.

Finally, appellants attempt to analogize Rodman's role in this case to that of the sugar merchants in *United States* v. *Falcone*, 311 U.S. 205 (1940). In *Falcone*, it was held that a sugar merchant who supplied his legal product to a distiller knowing that it would be used to distill illegal spirits would not be convicted of conspiring with the distiller. Rodman, of course, was not attempting to supply a legal and harmless product, but rather sought to supply Rosenberg with a broker who was prepared to take illegal kickbacks. *Cf. Direct Sales Co.* v. *United States*, 319 U.S. 703 (1943). Moreover, Rodman not only possessed a casual knowledge of Rosenberg's illegal objectives, he quite plainly was a principal architect of the unlawful endeavor. To seek to equate the indifference of the sugar merchants in *Falcone* with the nefarious intent of Rodman fully reveals the lengths to which the defendants will go to avoid the consequences of their illegal conduct.

POINT II

The exclusion of evidence offered through Rosemary Rodman was not error.

Rodman argues that the trial court's exclusion of evidence offered through his wife of conversations between Noonan and Mrs. Rodman and between Rodman and his wife requires a new trial. However, even at the date of the filing of his brief, Rodman has not set forth for any court the "substance of the evidence" offered and his argument is thus without merit.

Rodman's wife testified that she overheard her husband speaking on the phone to a person he called Ken, and she recited Rodman's alleged half of the conversation to the effect that he was not involved in securities any

longer and did not want to be. She concluded that her husband seemed upset. (Tr. 557-58). An attempt to elicit from Mrs. Roman what Rodman told her thereafter was objected to and the objection was sustained. Rodman at no time made an offer of proof of what Mrs. Rodman would have testified to, arguing only that it was offered to show "Mr. Rodman's state of mind." (Tr. 556). Similarly, objections were sustained to Mrs. Rodman's testifying to what Ken Noonan said to her on the phone (Tr. 558) and to what Rodman told her thereafter when she told him she had given Noonan Rodman's phone number in Binghamton. (Tr. 559). Rodman again never attempted to advise the court what the substance of the excluded testimony would be.

Rule 103(a)(2), Federal Rules of Evidence, provides:

> "Error may not be predicated upon a ruling which . . . excludes evidence unless a substantial right of the party is affected, and
>
> * * * * *
>
> (2) Offer of proof. — In case the ruling is one excluding evidence, the substance of the evidence was made known to the court by offer or was apparent from the context within which questions were asked."

Having no offer of proof on which to rule, the court did not err in excluding the evidence. In the absence of any showing of what the excluding testimony was, thereby rendering impossible any determination of the relevance or materiality of the evidence, no claim of error based on exclusion of the evidence can be made.

An offer of proof in this case was particularly important because of the nature of the witness. Since the witness was the defendant's wife and obviously an inter-

ested witness, the court had to be especially careful to protect against her blurting out irrelevant or otherwise improper statements which might severely prejudice the case.*

POINT III

The Court's decision to postpone the Government's rebuttal until after an overnight recess was not an error.

The defendants argue that the trial court's decision to postpone the Government's rebuttal until after an overnight recess deprived them of a fair trial and requires reversal. This argument is patently absurd.

Defendants concede that the trial judge has broad discretion to determine the conduct of the trial, particularly in setting the time schedule for the court day, declaring recesses and the like, and that the court's exercise of this discretion will not be disturbed absent a manifest abuse. (Br. 44-45). *E.g.*, *Carter* v. *United States*, 373 F.2d 911 (9th Cir. 1967).

In this case, Judge Gagliardi initially expressed his intent to have summation and rebuttal completed by the end of the day. (Tr. 611). The court's intention was doubtless influenced by the estimated time required for

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* Defendants argue that the court should have permitted Mrs. Rodman to testify about her telephone conversation with Noonan because there was sufficient circumstantial evidence for the jury to conclude that the caller was, in fact, Noonan. That may be the case, but that does not satisfy the basic objection to the testimony—that it was hearsay. In the absence of an offer of proof to establish an exception to the hearsay rule, what Mrs. Rodman had to say about what Noonan said to her was quite clearly objectionable.

the summations which counsel predicted would take a total of approximately two hours. (Tr. 566). When the last defense summation was completed, however, the judge noted that the time was 6:15 P.M.; that the jury had listened to over three hours of argument; and that they had already sat well beyond the end of the normal court day. He then inquired whether the jurors preferred to recess for the night and, upon receiving unanimous affirmative responses, the court dismissed the jury for the night. (Tr. 673-74).

In responding to the defense objections to its decision to delay the Government's rebuttal, the court observed:

> "I told you the last trial not to cover the same ground that was covered by your predecessor. There could have been a certain way to have been a lot more concise, a lot less rambling, a lot less encroaching upon the function of the court, which is to instruct the law. I feel there was a lot of room for more objections. If taken the objections would have been sustained. But I am not going to have the jury stay for another 25 or 30 minutes to hear rebuttal." (Tr. 679).

In addition, the court was not unmindful of the fact that defense counsel had overstepped the bounds of propriety during the trial and in summation remarks. Objections had been made to certain comments and the court stated, out of the presence of the jury, that at least one comment was "highly improper and it is going to be corrected." (Tr. 683). The court followed that observation with a general description of its opinion of the conduct of the trial:

> "There has been a lot done on the part of both defense counsel, both in this trial and the previous trial. I don't know what we can do about it, but

> I certainly think we ought to do something about it, and I think there ought to be a lot more done in connection with counsel in these cases coming in here and behaving in the manner in which certain counsel have behaved. I don't know what to do about it. I am really surprised and discouraged sometimes where there is no action taken at all, and I don't know when it can be expected to take that action. I will certainly make my position known at the next meeting of the judges. When the prosecutor steps over the bounds of propriety, the Court of Appeals dismisses, or even the trial judge dismisses the indictment. If defense counsel come in here and behave the way they have, I think it is a disgrace and a usurpation of their right to practice law in a lot of cases. I just cannot understand it, but I am certainly not going to sit here and continue without at least making an effort to do something about it." (Tr. 683-84).

In light of these circumstances, it was entirely proper for the judge to excuse the jurors who already had sat for a substantial period beyond the ordinary end of the court day. And finally, defendants point to no specific prejudice arising from the delay, other than an alleged tactical advantage to the Government. No claim is made that anything about the Government's rebuttal was improper.

POINT IV

The prosecutor's conference with the witness Noonan was not improper.

Defendants claim that the conference between the Assistant United States Attorney who tried the case and the witness Noonan during a recess in Noonan's cross-examination "so violated fundamental principles . . . as to taint the entire trial." (Br. 50). This argument, totally unsupported by any reference to cases, statutes, court rules or canons of ethics, is frivolous.

During his cross-examination, Noonan was asked a series of questions about why he made certain statements or asked certain questions during his tape-recorded conversations with Rodman and Rosenberg. Although it must have been obvious to everyone that the purpose of everything Noonan said during the tape-recorded conversations was to draw out as much evidence as possible from the defendants in order to corroborate his story, Noonan, either because of a misunderstanding of the questions, or, worse, a desire to be evasive on the issue, gave answers that were obviously incorrect. (Tr. 113-15). During the luncheon recess, the Assistant United States Attorney spoke with Noonan, asked him essentially the same questions he had been asked on cross-examination, and reminded Noonan of his obligation to tell the truth. (Tr. 159-62, 196-97). On his redirect examination, Noonan admitted that the reason for his statements and questions during the tape-recorded conversations was "to reinforce the story that I had told you [the Government] about having been approached to get involved in an illegal deal." (Tr. 197-98).

There is absolutely nothing, absent an order of the court (and there was none in this case), to prohibit the prosecutor from speaking with a witness while the wit-

ness is on the stand. *In re United States*, 286 F.2d 556, 562 (1st Cir. 1961), *rev'd on other grounds sub nom. Fong Foo* v. *United States*, 369 U.S. 141 (1962). See also *Frazer* v. *United States*, 233 F.2d 1, 2 (9th Cir. 1956) (where the court commended the Government for privately reminding a witness of a false statement, causing the witness to change her testimony and testify truthfully).

The conversation between the witness Noonan and the prosecutor was placed before the jury and fully explored by the defense—as was their right. The only detriment they suffered was that they were deprived of an opportunity to attack a patently erroneous or even deliberately false allegation because it was corrected truthfully by the witness. That the truth came to the fore may have been tactically disadvantageous to the defense, but that certainly does not constitute legally cognizable prejudice.

CONCLUSION

The judgments of conviction should be affirmed.

Respectfully submitted,

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APPENDIX

Transcript of Conversation between Noonan and Rodman 12/4/75

Noonan: I'm now going to call Mr. Rodman at 914-352-5884. I'm making this recording of this telephone conversation voluntarily and of my own free will.

Rodman: Hello.

Noonan: How you doing?

Rodman: Alright, how you?

Noonan: Ok.

Rodman: What's going?

Noonan: No, I didnt' do anything today; I couldn't get a hold of this fucking guy after this morning, you know.

Rodman: How come?

Noonan: I, well I talked to him, you know, after, uh, you told me—I know who this guy is, by the way.

Rodman: Alright, I don't know and I don't, you know, Ok?

Noonan: Yea,

Rodman: Forget it, I mean, you know what I'm saying?

Noonan: Yea, Ok.

Rodman: Alright.

Noonan: Uh, I talked to him, and he explained the deal to me.

Rodman: Um hm.

Noonan: And he's trying to give me like a half less five percent, you know, for, uh, somebody to do the checks or something like this.

Rodman: Receipts and stuff, huh?

Noonan: Huh?

Rodman: Well that's your business; that's why I said I don't wanna know, I don't wanna know from it; I really don't.

Noonan: Ok, No, here's my thing, I can never reach this guy.

Rodman: Well I don't know why.

Noonan: I'm just, uh, you know, I'm worried about getting paid from him. I just, uh, you know . . .

Rodman: Well, uh . . .

Noonan: I don't know, I mean, I want to suggest . . .

Rodman: I wouldn't, but I mean, again, you know, I don't, I certainly don't want to even be, you know, I don't even want to be concerned, you know, I'd love to turn around and know something good happened, you didn't even have to do it, ok?

Noonan: Yea.

Rodman: Seriously, but, uh, uh, I wouldn't worry about that aspect of it, Ok? The only thing that I was worried about was that you weren't going to get a full count. Not you, but him, Ok? And I didn't want, I didn't want let's say, you know, you did, uh, uh, uh, 50 gross, Ok?

Noonan: Yea.

Rodman: And the other guy decided that he was going to get rid of a couple o' his own.

Noonan: Yea.

Rodman: You know what I mean. That was my only fear. And that was the main reason . . .

Noonan: Oh! Then he'd say you didn't do, uh, like 50 with me, you only did 49.

Rodman: Yea, right, but, but I spelled it out to him and he said no, he understands that and this, but I wanted to make sure that, you know, you two have that understanding.

Noonan: I've got to go directly to him though; I've got to direct everything to him, that's the only . . .

Rodman: Well I don't know if you can, you know: if can, great, then you got no problem. If you can't well you just make sure that he understands he's got to make up for it. It's his act. You know what I mean? So, uh, uh . . .

Noonan: What else is doing?

]There follows 3 minutes and twenty seconds of unrelated conversation.[

Rodman: Um hum. So when are you gonna figure out what you're finally doing with this guy (inaudible)?

Noonan: Uh, I don't know, you know, probably tomorrow. I talked to, you know, the guy. I, I just want to make sure I'm, I'm gonna get paid from him, that's all.

Rodman: You just spell it out, you know. You just spell it out to him, that's all. Don't be bashful.

Noonan: I don't know; he just, uh . . .

Rodman: I've never known you to be bashful.

Noonan: Yea, no, we'll uh, you know, I'll see what I can do with it. But, uh, the deal sounds alright.

Rodman: Good luck.

Noonan: I mean the bread is nice. And, you know, the light will shine on everybody here. And, uh, that's, you know, that's all I can think about.

Rodman: Alright.

Noonan: Alright.

Rodman: Yep.

Noonan: Ok, I'll chat with you tomorrow maybe, alright?

Rodman: I'll be running around so, if you want, I'll call you just, uh, you know . . .

Noonan: Ok, give me a buzz either at home or in the office, alright?

Rodman: Alright.

Noonan: Ok.

Rodman: Goodbye.

Noonan: Goodbye.

★ U. S. Government Printing Office 1976 – 614—350—706

Form 280 A - Affidavit of Service by mail

AFFIDAVIT OF MAILING

State of New York)
County of New York)

JOHN A. LOWE, being duly sworn, deposes and says that he is employed in the office of the United States Attorney for the Southern District of New York.

That on the 20th day of September, 1976 he served a copy of the within Brief (2 copies) by placing the same in a properly postpaid franked envelope addressed:

MORTON BERGER, ESQ.
13 Eastbourne Drive
Spring Valley, NY 10977

And deponent further says that he sealed the said envelope and placed the same in the mail chute drop for mailing within the United States Courthouse Annex, One St. Andrew's Plaza, Borough of Manhattan, City of New York.

John A. Lowe

JOHN A. LOWE
Assistant United States Attorney

Sworn to before me this

20th day of September, 1976

Gloria Calabrese

GLORIA CALABRESE
Notary Public, State of New York
No. 31-4507510
Qualified in Kings County
Commission Expires March 30, 1977